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FILED BY FAX

ALAMEDA COUNTY

November 13, 2014

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:
RG14748134

8 SUPERIOR COURT OF CALIFORNIA
 9 COUNTY OF ALAMEDA

12 ENVIRONMENTAL RESEARCH
 CENTER, a California non-profit
 13 corporation,

14 Plaintiffs,

15 vs.

16 LIVING ECOLOGY INC, LIVING
 ECOLOGY MANUFACTURING INC.
 17 and DOES 1-25, Inclusive,

18 Defendants.

Case No.:

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Health & Safety Code § 25249.5, et seq.]

**[UNLIMITED CIVIL CASE - AMOUNT
DEMANDED EXCEEDS \$25,000]**

19
 20 Plaintiff Environmental Research Center, Inc. ("Plaintiff") brings this action in the
 21 interests of the general public and, on information and belief, hereby alleges:

22 **INTRODUCTION**

23 1. This action seeks to remedy Defendants Living Ecology Inc, Living Ecology
 24 Manufacturing Inc. and Does 1-25, Inclusive's (individually referred to hereinafter as
 25 "Defendant" or collectively as "Defendants") continuing failure to warn consumers in California
 26 that they are being exposed to lead, a substance known to the State of California to cause cancer,
 27 birth defects and other reproductive harm.

28 2. Defendants have manufactured, packaged, distributed, marketed, sold and/or have

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1 otherwise been involved in the chain of commerce of, and continue to manufacture, package,
2 distribute, market, sell and/or otherwise continue to be involved in the chain of commerce of the
3 following ingestible products, which contain the chemical lead and which have been and
4 continue to be offered for sale, sold and/or otherwise provided for use and/or handling to
5 individuals in California:

- 6 1. Bio International Organic Active Greens Powder
- 7 2. Bio International Organic Active Greens
- 8 3. Organic Food Bar Inc. Raw Organic Food Bar Cinnamon Raisin
- 9 4. Organic Food Bar Inc. Raw Organic Food Bar Chocolatey Chocolate Chip
- 10 5. Organic Food Bar Inc. Organic Food Bar Chocolate Covered Active Greens
- 11 6. Organic Food Bar Inc. Organic Food Bar Active Greens - Protein Chocolate
12 Covered
- 13 7. Organic Food Bar Inc. Organic Food Bar Active Greens
- 14 8. Organic Food Bar Inc. Organic Food Bar Active Greens Chocolate
- 15 9. Organic Food Bar Inc. Organic Food Bar Original
- 16 10. Organic Food Bar Inc. Organic Food Bar Protein
- 17 11. Organic Food Bar Inc. Organic Food Bar Vegan
- 18 12. Organic Food Bar Inc. OFB Vegan Protein Vanilla
- 19 13. Organic Food Bar Inc. OFB Vegan Protein Strawberry
- 20 14. Organic Food Bar Inc. OFB Vegan Protein Chocolate
- 21 15. Organic Food Bar Inc. OFB Whey Protein Strawberry
- 22 16. Organic Food Bar Inc. OFB Whey Protein Vanilla

23 These listed products are hereinafter referred to together as “THE PRODUCTS”.

24 3. The use and/or handling of THE PRODUCTS causes exposures to lead at levels
25 requiring a “clear and reasonable warning” under California’s Safe Drinking Water and Toxic
26 Enforcement Act of 1986, Health & Safety Code (“H&S Code”) §25249.5, *et. seq.* (also known
27 as “Proposition 65”). Defendants have failed to provide the health hazard warnings required by
28 Proposition 65.

1 commerce of THE PRODUCTS for sale or use in California, and/or is responsible, in some
2 actionable manner, for the events and happenings referred to herein, either through its conduct or
3 through the conduct of its agents, servants or employees, or in some other manner, causing the
4 harms alleged herein. Plaintiff will seek leave to amend this Complaint to set forth the true
5 names and capacities of DOES when ascertained.

6 16. Plaintiff is informed and believes and thereon alleges that each Defendant is in
7 some manner responsible for the events set forth in this Complaint and proximately caused the
8 injuries and damages to Plaintiff as alleged in this Complaint.

9 **STATUTORY BACKGROUND**

10 17. The People of the State of California have declared in Proposition 65 their right
11 “[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
12 reproductive harm.” (Section 1(b) of Initiative Measure, Proposition 65).

13 18. To effect this goal, Proposition 65 requires that individuals be provided with a
14 “clear and reasonable warning” before being exposed to substances listed by the State of
15 California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent
16 part:

17 No person in the course of doing business shall knowingly and
18 intentionally expose any individual to a chemical known to the state to
19 cause cancer or reproductive toxicity without first giving clear and
20 reasonable warning to such individual....

21 19. Proposition 65 provides that any person who “violates or threatens to violate” the
22 statute “may be enjoined in any court of competent jurisdiction.” (H&S Code §25249.7(a).)
23 “Threaten to violate” is defined to mean creating “a condition in which there is a substantial
24 probability that a violation will occur.” (H&S Code §25249.11(e).) Violators are liable for civil
25 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

26 **FACTUAL BACKGROUND**

27 20. On February 27, 1987, the State of California officially listed the chemical lead as
28 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the

1 warning requirement one year later and was therefore subject to the “clear and reasonable”
2 warning requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
3 Regulations (“CCR”) §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

4 21. On October 1, 1992, the State of California officially listed the chemical lead as a
5 chemical known to cause cancer. Lead became subject to the warning requirement one year later
6 and was therefore subject to the “clear and reasonable” warning requirements of Proposition 65
7 beginning on October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

8 22. Plaintiff is informed and believes, and based on such information and belief,
9 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
10 California without the requisite clear and reasonable warnings before, on, and after January 31,
11 2011. THE PRODUCTS continue to be marketed, distributed and sold in California without the
12 requisite warning information.

13 23. As a proximate result of acts by Defendants, as a person in the course of doing
14 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
15 California, including in the County of Alameda, have been exposed to lead without clear and
16 reasonable warnings. The individuals subject to exposures to lead include normal and
17 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
18 PRODUCTS.

19 24. At all times relevant to this action, Defendants have knowingly and intentionally
20 exposed the users and/or handlers of THE PRODUCTS to lead without first giving clear and
21 reasonable warnings to such individuals.

22 25. Individuals using or handling THE PRODUCTS are exposed to lead in excess of
23 the “maximum allowable daily” and “no significant risk” levels determined by the State of
24 California, as applicable.

25 26. At all times relevant to this action, each Defendant has, in the course of doing
26 business, failed to provide individuals using and/or handling THE PRODUCTS with clear and
27 reasonable warnings that THE PRODUCTS expose individuals to lead.

28 27. THE PRODUCTS continues to be marketed, distributed, and/or sold in California

1 without the requisite clear and reasonable warnings.

2 **FIRST CAUSE OF ACTION**

3 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, et seq.)**

4 28. Plaintiff hereby incorporates by reference each and every preceding allegation and
5 paragraph as though fully set forth in this cause of action.

6 29. On January 31, 2014 and April 4, 2014, Plaintiff sent separate 60-Day Notice of
7 Proposition 65 Violations to the requisite public enforcement agencies (“Notices of Violations”).
8 The Notices of Violations were issued pursuant to, and in compliance with, the requirements of
9 H&S Code §25249.7(d) and the statute’s implementing regulations regarding the notices of
10 violations to be given to certain public enforcement agencies and to the violator. The Notices of
11 Violations were issued as follows:

- 12 1. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
13 MANUFACTURING INC. and the California Attorney General were provided
14 copies of the Notices of Violations, along with a Certificates of Merit by the
15 attorney for the noticing party stating that there is a reasonable and meritorious
16 cause for this action. The requisite county district attorneys and city attorneys
17 were provided copies of the Notices of Violations and Certificates of Merit.
- 18 2. Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY
19 MANUFACTURING INC. were provided with the Notices of Violations, a copy
20 of a document entitled “The Safe Drinking Water and Toxic Enforcement Act of
21 1986 (Proposition 65): A Summary,” which is also known as Appendix A to Title
22 27 of CCR § 25903.
- 23 3. The California Attorney General was provided, with the Notices of Violations,
24 additional factual information sufficient to establish a basis for the Certificates of
25 Merit, including the identity of the persons consulted with and relied on by the
26 certifier, and the facts, studies, or other data reviewed by those persons, pursuant
27 to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

28 30. The appropriate public enforcement agencies have failed to commence and

1 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendants
2 based on the allegations herein.

3 31. By committing the acts alleged in this Complaint, Defendants at all times relevant
4 to this action, and continuing through the present, have violated and continue to violate H&S
5 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
6 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
7 allowable exposure levels without Defendants first giving clear and reasonable warnings to such
8 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendants have manufactured,
9 packaged, distributed, marketed, sold and/or have otherwise been involved in the chain of
10 commerce of, and continue to manufacture, package, distribute, market, sell and/or otherwise
11 continue to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
12 and will be used and/or handled by individuals in California, without Defendants providing clear
13 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
14 birth defects and other reproductive harm posed by exposure to lead through the use and/or
15 handling of THE PRODUCTS. Furthermore, Defendants have threatened to violate H&S Code
16 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
17 for use and/or handling to individuals in California.

18 32. By the above-described acts, Defendants have violated H&S Code §25249.6 and
19 are therefore subject to an injunction ordering Defendants to stop violating Proposition 65, and to
20 provide required warnings to consumers and other individuals who will purchase, use and/or
21 handle THE PRODUCTS.

22 33. An action for injunctive relief under Proposition 65 is specifically authorized by
23 Health & Safety Code §25249.7(a).

24 34. Continuing commission by Defendants of the acts alleged above will irreparably
25 harm the citizens of the State of California, for which harm they have no plain, speedy, or
26 adequate remedy at law.

27 35. Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

28 ///

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for the following relief against Defendants LIVING ECOLOGY INC. and LIVING ECOLOGY MANUFACTURING INC.:

A. A preliminary and permanent injunction enjoining the Defendants, each of its agents, employees, assigns and all persons acting in concert or participating with each Defendant, from manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or use in California without first providing clear and reasonable warnings, within the meaning of Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead;

B. An assessment of civil penalties against each Defendant, pursuant to Health & Safety Code §25249.7(b), in the amount of \$2,500 per day for each violation of Proposition 65;

C. An award to Plaintiff of its reasonable attorney fees pursuant to California Code of Civil Procedure §1021.5 or the substantial benefit theory;

D. An award of costs of suit herein; and

E. Such other and further relief as may be just and proper.

Dated: November 13, 2014

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By: _____
WILLIAM F. WRAITH
Attorney for Plaintiff Environmental
Research Center